United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

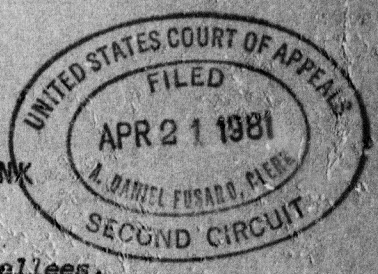
77-7177

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B/PS



JOHN F. MEEHAN AND ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket N. 77-7177

JOHN F. MEEHAN AND ROBERT W. FINK
d/b/a MEEHAN & FINK,

Plaintiffs-Appellees,

-against-

JOHN SNOW AND JUDY SNOW,

Defendants-Appellants.

BRIEF OF PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

Plaintiffs, New York attorneys, commenced an action in Supreme Court, Orange County, New York State, in September, 1975 for professional services rendered between the period December, 1973 and September, 1975 and demanded damages of $14,316.51.

Defendants removed the action to the Southern District in November, 1975 and served an answer with counterclaims for $1,500,000.00 in December, 1975.

On motion granted by District Court Judge, Henry Werker, the complaint was amended to add two causes of action for defamation. The amended complaint was served and defendants failed to timely serve an answer. Plaintiffs' Rule 55(b) motion was granted by District Court Judge, Henry

Werker, in February, 1977 and judgment on the first cause of action for $15,528.51 was entered in March, 1977. Defendants' Rule 60(b)(1) motion was denied by Judge Henry Werker in July, 1977 and a reference was directed to ascertain damages on the two causes of action for defamation. The inquest was held in June, 1979 before Magistrate Harold Raby and an opinion and order of District Court Judge Mary Lowe awarding $2,000.00 general compensatory damages was filed in June, 1980.

ISSUES PRESENTED

1. Was the entry of default judgment pursuant to Rule 55(b)(2) and denial of defendants' motion pursuant to Rule 60(b)(1) a proper exercise of discretion?

2. Is the requisite abuse of discretion necessary for reversal present in the case at bar?

STATEMENT OF THE CASE

Plaintiffs are attorneys suing for professional services rendered at the request of defendants between the dates of December, 1973 and September 1975 (am. cmplt., para. 5, A-25). The services alleged consist of 33.75 hours expended in work before a planning board and in a special proceeding, 51.7 hours expended in defense of a suit brought against defendant, Judy Snow, in Supreme Court Orange County, and 182.9 expended in prosecution of a mortgage foreclosure action. (am. cmplt., para. 5 - 10, A-25, 26).

The work before the planning board and special proceeding, and the defense of the suit for broker's commissions have not been disputed by the defendants. Indeed, the suit against the defendant, Judy Snow, for

commissions was dismissed in July, 1975 by summary judgment. In the foreclosure, the lis pendens was filed in January, 1974, and the defendants had retaken possession in January, 1975. (affidavit, paras. 18 - 19, A178-179).

Defendants have denied that they owe plaintiffs any money due to the manner in which the foreclosure was handled, and because of damages they sustained which they allege totaled $1,500,000.00. The affidavits of the defendants (A124-134, A219-227) show these damages to be grounded primarily upon the events surrounding sale of their premises (a period from June, 1973 to closing of title in September of 1973) and secondarily upon certain areas of the foreclosure suit. No where in any of the papers of the defendants is it shown how the damages of $1,500,000.00 were arrived at. (In fact, defendants purposely omitted specifying the particulars of their counterclaim). (Affidavit, para. 24, A-228).

The affidavits of the defendants (A124-134, A219-227) show that they had knowledge of all events complained of either as the events transpired, or by February, 1975. Yet they continued to retain plaintiffs and to utilize their services until September, 1975, and there was no mention of any of the matters set forth in plaintiffs' affidavit. [1] Yet, defendants continued to retain plaintiffs and to utilize their services until

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[1]There was discussion concerning a deficiency judgment. However, collectibility aside, there could have been no deficiency since the value of the land was in excess of the amount of the judgment for the mortgage

(con't on next page)

September, 1975. They delayed meeting with plaintiffs about the bill through the summer of 1975, all the while disposing of their New York property. (Para. 6, A-164). [2]

A summons with notice, Supreme Court, Orange County, was served on defendants on September 24, 1975 in Pennsylvania. They appeared by their present attorney on October 15, 1975, and a complaint was served on October 24, 1975 (affidavit, para. 2, A-41).

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default. (Defendants sold the premises in September, 1973, for $350,000.00 and took back mortgages totaling $233,000.00). (A-196, 197); defendants allege there was a purchaser ready to buy the property (at judicial sale) for $290,000.00 in May, 1974, (affidavit, para. 12, A-131) - This sale would have been subject to the Goshen Savings Bank Mortgage of approximately $40,000.00. Market value is, therefore, shown by the original sale to have been approximately $350,000.00 in September, 1973, and approximately $370,000.00 in May, 1974.

[2]At Paragraph 22 of their affidavit, the defendants state "(t)he defendants kept asking Mr. Meehan for a bill but they were told that this was the least of our worries and he kept avoiding the presentation of a bill. Defendants sought other counsel during this period in dissatisfaction with plaintiff's services contrary to plaintiff's statements. As a matter of fact, defendants frequently advised Mr. Meehan by telephone of their frustration about the delays in consummating the foreclosure sale." (A-227, 228).

Defendants peg the conclusion of the foreclosure as February 25, 1975 (para. 20, A-227). If defendants were insisting upon a bill on or before February, 1975, why did they avoid a meeting in July and August to discuss the bill submitted by that time? Letters 6/16/75, 8/11/75, and 9/5/75, (A-200, 203, 204). If defendants sought other counsel on or before February, 1975, why is it that they failed to confront plaintiffs with their allegations that plaintiffs had mishandled their litigation? Why did they not commence suit for their $1,500,000.00 in damages on or before February, 1975 rather than wait to counterclaim in December, 1975?

The defendants requested and were granted three extensions of time to answer, up to December 19, 1975, at which time the answer with counterclaims was served. Curiously, the defendants removed the action to federal court, and thereupon asserted counterclaims, together with the affirmative defenses that the court did not have jurisdiction over subject matter or the parties. (Answer, paragraphs 7 and 8, A-12).

A demand for interrogatories was served on defendants on February 6, 1976 and were never answered. (Affidavit, paragraph 2, A-42). At no time did the defendants themselves seek discovery.

On September 15, 1976 an amended complaint was served by mail on defendants' attorney. (Affidavit, paragraph 3, A-42, affidavit of service A-60).

Defendants' attorney alleges serving the answer to the amended complaint on October 8, 1976, (affidavit, paragraph 2, A-61) which was seventeen days after service of the complaint. In fact, the envelope in which the answer arrived bore the U.S. post mark - October 14, (A-79) and the answer was stamped when it was received on October 15, 1979. (A-70). [3]

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[3] In spite of the U.S. post mark, defendants' counsel maintains the answer was served on October 8. If this was so, why had he not routinely filed his answer with the clerk after service? See docket sheet, A-2. Defendants' counsel could not had received notice of the default until October 16 or thereafter, so that he would have had eight days to mail the original answer to the amended complaint to the clerk. The original answer was served on December 19, and received by the clerk on December 24. (A-2).

Defendants' attorney stated he was "...essentially a state court practitioner and overlooked the difference between the rules involved." (Affidavit, para. 4, A-62). Yet, it was he who had removed the case to the federal court; and, in any event, as was shown, service was made on or about October 14, so that it was late in either court.

Plaintiffs duly moved pursuant to Rule 55(b)(2) for leave to enter a default judgment, which motion was returnable on October 27, 1976 (A-40). The opposition to the motion, referred to as "(d)efendants' counsel's prompt response to this motion" (brief of appellants, page 2; see also pages 8, 9 & 12) consisted of a three page attorney's affirmation, with one legal citation, and a reference to a single section in Moore's Federal Practice, was not served by mail by defendants' attorney until October 26, 1976. (A-64).

The decision of Judge Werker granting plaintiffs' Rule 55(b) motion provided that defendants would have thirty days from filing (February 2, 1977) to move to set aside the default. (A-119). Defendants obtained an extension to move to March 19, 1977 (docket entry nr. 29, A-3) and a further extension (sixty days from entry) pursuant to a counter proposed judgment (A-22).

Although timely due to the extensions obtained, defendants motion pursuant to Rule 60(b)(1) was made on April 1, 1977, fifty eight days after entry of the decision granting the default.

SUMMARY OF ARGUMENT

The course of conduct of both the defendants themselves and of their attorney is the issue, not a single default of a few days' duration. The defendants retained the plaintiffs into September, 1975 despite their belated claim that they were damaged in the amount of $1,500,000.00 by plaintiffs allegedly mishandling matters on and before February, 1975. (And the bulk of the events complained of occurred from June, 1973 to September, 1973). It was not until plaintiffs commenced suit in September, 1975 for services rendered that the claims were first made. The defendants' counsel continually delayed prosecution of this suit, neglected to file answers to interrogatories and initiated no discovery. The default in answering the amended complaint was allegedly due to lack of familiarity with federal rules and a hectic practice - negligence and law office failure.

The defendants' opposition to the Rule 55(b) motion consisted of a three page attorney's affirmation and allusion to a pleading signed by the attorney. No facts were presented to the court to show excusable default or the existence of a meritorious defense. Nothing by the defendants themselves was submitted. No legal memorandum in opposition was submitted. And the opposition to the motion returnable October 27, 1976 was served (by mail) on October 26, 1976.

In granting plaintiffs' Rule 55(b) motion the court had found no adequate excuse for the default and noted defendants' counsel's dilatory course of conduct, specifically singling out the default in answering the interrogatories. Despite this, defendants' papers in their Rule 60(b)(1) motion contained not one reference to their continuing course of conduct,

not one excuse for failure to serve the answers to the interrogatories, and added nothing to the excuse given for the default in serving the answer. Indeed, defendants' counsel directed the court's attention back to his affirmation in opposition to the Rule 55(b) motion for the excuse for the default. The defendants' affidavits alleged malpractice based upon events surrounding the sale of their property (June, 1973 to September, 1973) and certain alleged problems in the foreclosure action known to them on and before February, 1975; they said they had sought advise from other counsel during that period but did not explain why they had failed to commence suit, especially in light of the $1,500,000.00 damages claimed; they briefly mentioned that the foreclosure had been successfully prosecuted in both the Supreme Court and twice in the Appellate Division; and most importantly, their affidavits were devoid of any actions taken by them to explain the dilatory course of conduct in both the prosecution and defense of the action, or any actions taken by them to see that their attorney diligently pursued the matter.

Given the course of conduct and the inadequacy of the papers in opposition to the Rule 55(b) motion, granting the motion was well within the discretion of the court, and not to have done so would have been an abuse of discretion.

In the Rule 60(b)(1) motion the court thoroughly reviewed the facts before it and the law. The decision was amply grounded upon the defendants' failure to provide adequate facts to explain the default. Given the persistent course of dilatory conduct of both the defendants and of their attorney, and the failure to provide facts to explain that course of

conduct, or the default, the denial of defendants' Rule 60(b)(1) motion was within the bounds of the court's discretion.

I

THE ENTRY OF DEFAULT JUDGMENT PURSUANT TO RULE 55(b)(2) AND DENIAL OF DEFENDANTS' MOTION PURSUANT TO RULE 60(b)(1) WERE A PROPER EXERCISE OF DISCRETION

Defendants defaulted in service of an answer to the amended complaint and plaintiffs moved pursuant to Rule 55(b)(2) to enter judgment. In opposition to plaintiffs' motion, the defendants presented a three page affirmation signed by their attorney, a person with no personal knowledge of the underlying events. The legal memorandum required by General Rule 9(b) was lacking, and authority for defendants' position consisted of one case, which held against defendants' position, and reference to one section in Moore's Federal Practice.

The good cause shown for the default was that "...in the flow of his hectic practice, (defendants' attorney) confused federal court practice with New York State practice by assuming..." he had twenty days to answer, that he was "...essentially a state court practitioner and overlooked the difference between the rules..." and that his "...was a ministerial error...". (A-61,62).

The meritorious defense required was demonstrated by the statement that

> "Defendants have a good and meritorious defense and counterclaim against the plaintiffs as more fully set forth in the answer and proposed answer to the amended complaint, a copy of which is annexed hereto". (A-62).

Defendants' attorney dealt solely with the instant default. He neglected to address the fact that he had been dilatory from the very commencement of the action, having sought three extensions of time to answer the complaint and one extension of time to answer plaintiffs' motion to amend the complaint. He neglected to address the fact that in the more than seven months that had elapsed since a demand for interrogatories had been served upon him, not one answer had been provided; nor had any discovery proceedings been commenced by him.

In fact, although timely served with plaintiffs' motion for default, returnable on October 27, 1976, the answering papers consisting of the three page affirmation in opposition was served on plaintiffs by mail on October 26, 1976.

The court in its memorandum decision noted that while defendants' attorney contended he was a state court practitioner unfamiliar with federal requirements, that it was he who had removed the action to federal court and that it could "hardly be said that entry of a default judgment here would work an injustice in view of his continuing course of conduct." (A-118, 119).

In the Rule 60(b)(1) motion to vacate the default, affidavits by the defendants were submitted and alleged therein were defenses to plaintiff's action. Defendants chose not to elaborate upon their counterclaims stating they were "not in issue in this motion." (Paragraph 24, A-228).

In granting plaintiffs' Rule 55(b) motion, the court had rejected defendants' counsel's reason for defaulting and noted his "...continuing course of conduct" including failure to answer the interrogatories. (A-117,

118). However, defendants' counsel's affirmation on the Rule 60(b)(1) motion did no more then state "(o)n the issue of Defendants' required showing of excusable neglect, affirmant respectfully refers the Court to Affirmant's affirmation in opposition to the previous motion"; and further stated that late service was due to "...inadvertence and mistake...". (Para. 5, A-136). The previous excuse of a "hectic practice" was not mentioned, nor was the failure to answer the interrogatories.

In deciding the defendants' motion the court took cognizance of the requirement that Rule 60(b) requires that "...the defendant must assert facts which demonstrate that there was a good reason for the default and that there exists a meritorious defense...", that the application "...is remedial in nature and ...within the sound discretion of the court", that "(t)he Court's discretion, however, is not absolute nor should it be exercised in an arbitrary or capricious manner", that "...Rule 60(b) should be construed liberally with a view towards securing justice...", that "...it is preferable to dispose of cases on the merits..." but that "(s)ince Rule 60(b) allows for extraordinary relief it should be granted only upon a showing of exceptional circumstances." (A240, 241).

The court failed to find that the defendants' attorney's confusion of federal court practice with state court practice to be the "'excusable neglect' as contemplated by the Federal Rules." The court further stated that defendants' counsel's implications concerning "...his hectic practice...", with no "...satisfactory explanation of the demands of that practice..." cannot form a "...basis upon which to determine if they were so urgent or of such duration as to excuse counsel's neglect." The court again

noted that it was defendants themselves who removed the action to federal court. Further, the court declined to grant relief based upon the allegation that the defendants "...were not themselves negligent". Finding that defendants had "...failed to carry (the) burden of proof..." for the default, the court determined that it was unnecessary "...to address whether or not the defendants (had) asserted a meritorious defense...". (A241-242).

To prevail on either a Rule 55(b)(3) or a Rule 60(b)(1) motion both a good reason for default and a meritorious defense must be shown. Gomes v Williams, 420 F.2d 1364, 1366 (C.A.10, 1970), Central Operating Co. v Utility Workers of America, AFL-CIO, 491 F.2d 245, 252, (C.A.4, 1974), Universal Film Exchanges, Inc. v Lust, 479 F.2d 573, 576 (C.A.4, 1973), Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, 383 F.2d 249, 251, 252 (C.A.4, 1967).

A meritorious defense was not shown in the papers in opposition to the Rule (55)(b) motion by defendants' counsel's statements that it existed and by allusion to the pleading signed by him. Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, op. cit. page 251, 252 (C.A.4, 1967); Gomes v Williams, op. cit., page 1366; Madsen v A.J. Bumb, 419 F.2d 4, 6, (C.A.9, 1969).

Assuming, arguendo, defendants had a meritorious defense, failure to sustain the burden of a good reason for the default was sufficient to deny the motion. Smith v Stone, 308 F.2d 15, 18 (C.A.9, 1962). In Wilson v Moore & Associates, Inc., 564 F.2d 366, 368 (C.A.9, 1977) the court denied defendant's Rule 60(b) motion even though it assumed the defendant had a "nonfrivolous defense". In Central Operating Co. v Utility Workers of

America, AFL-CIO, op. cit., page 252, the district court had held defendant had failed to show a meritorious defense, but that while the circuit court found that "...the record indicates otherwise..." and that a meritorious defense did exist, it affirmed denial of the Rule 60(b) relief. In N. Walker v Tilley Lamb Company, Ltd., 467 F.2d 219 (C.A.3, 1972), an abuse of discretion was alleged by refusal of the trial judge to vacate a default entered as a result of failure for 43 days to answer interrogatories. Without discussing the merits of the case, the court affirmed. In Rutland Transit Company v Chicago Tunnel Terminal Company, 233 F.2d 655, 659 (C.A.7, 1956), on appeal under denial of Rule 55(c) and Rule 60(b) relief, the court held that "(i)n view of our determination that the defendants were guilty of inexcusable neglect, it becomes unnecessary to discuss the issue of a meritorious defense". See also Dolphin Plumbing Co. of Florida, Inc. v Financial Corporation of North America, 508 F.2d 1326, 1327 (C.A.5, 1975) wherein the court affirmed denial of 60(b) relief without discussing the defense.

Defendants' counsel urges ignorance of the rules of the court to which he removed the case, and a hectic practice. Being "...busy with other matters..." is not grounds for Rule 60(b) relief. Cline v Hoogland, 518 F.2d 776, 778 (C.A.8, 1975) "...(I)gnorance or carelessness on the part of an attorney..." generally will not "...provide grounds for 60(b) relief...". Hoffman v Celebrezze, 405 F.2d 833, 835 (C.A.8, 1969); United States v Thompson, 438 F.2d 254, 256 (C.A.8, 1971). See also United States v Erdoss, 440 F.2d 1221, 1223 (C.A.2, 1971) cert. denied 404 U.S. 849, 92 S.Ct. 83, 30 L.Ed.2d 88; Benton v Vinson, Elkins, Weems & Searles, 255 F.2d 299, 301

(C.A.2, 1958) cert. denied, 358 U.S. 885, 79 S.Ct. 123, 3 L.Ed.2d 113 (1958); Hale v Ralston Purina Co., 432 F.2d 156, 160 (C.A.8, 1970). See also Port-Wide Container Company v Interstate Maintenance Corporation, 440 F.2d 1195, 1196 (C.A.3, 1971) wherein the court allowed a default to stand even though the secretary for defendant's attorney apparently deliberately failed to give him a letter from plaintiffs' attorney stating that an answer had to be filed or a default judgment would be sought, which judgment was filed when the attorney, unaware of the ultimatum, failed to serve an answer.

The court noted defendants' "counsel impl(ied) that involvement in his hectic practice in some way contributed to his confusion". (A-242). But that no "...satisfactory explanation of the demands of that practice..." were given. (A242). Counsel failed to provide the "strong showing" necessary to obtain relief. Flett v W.A. Alexander & Co., 302 F.2d 321, 323, (C.A.7, 1962). Hectic practice or not, "...minimal internal procedural safeguards..." are insisted upon by the courts. Davis v Safeway Stores, Inc., 532 F.2d 489, 490 (C.A.5, 1976).[4]

Defendants' counsel protested that the default was merely a few days. Whether or not this is the case, and evidence presented by plaintiffs in the form of a post marked envelope, and the lack of filing of the amended answer

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[4]Although seeking relief under the guise of a state court practitioner, it is doubtful that defendants would succeed in state court under identical facts and circumstances. Counsel's law office failure is, as a matter of law, insufficient. Bruno v Village of Port Chester, 1980, 77 A.D.2d 580, 430 N.Y.S.2d 13 (2nd Dept.). See also Barash v Micucci, 1980, 49 N.Y.2d 594, 599, 600.

with the court clerk indicate otherwise, defendants' counsel failed in both motions to so much as address his other defaults and generally dilatory conduct. The court took proper notice of the "cumulative effect" of the neglect shown. Pagen v American Airlines, Inc., 534 F.2d 990, 993 (C.A.1, 1976).

Despite the urging of defendants' counsel, prejudice, or the lack thereof, need not always be considered. In Wilson v Moore and Associates, Inc., op. cit. page 368, affirming denial of 60(b) relief, the court noted that the plaintiff had not alleged prejudice should the judgment be vacated. Generally, prejudice, or the lack thereof, is not even mentioned where the court finds grounds to affirm denial of Rule 55(c) and 60(b) relief. See generally, Phillips v Insurance Company of North America, 633 F.2d 1165 (C.A.5, 1981); Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, op. cit.; Rutland Transit Company v Chicago Tunnel Terminal Company, op. cit.; Port Wide Container Company v Interstate Maintenance Corporation, op. cit.

Even if defendants were not blameless, the court would not be precluded from denying the motion based on counsel's neglect. Link v Wabash Railroad Co., 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962); Universal Film Exchange, Inc. v Lust, op. cit., page 573.

However, defendants were negligent themselves in that they failed to insure that their attorney was diligently pressing both defense of plaintiffs' action and pursuit of their counterclaims for $1,500,000. Further, nothing was submitted by defendants or their counsel to show that the defendants themselves were acting in a diligent manner. If defendants had been diligent, they would have known of the many delays, the failure to

respond to the demand for interrogatories, and the failure to initiate discovery.

In denying a Rule 60(b) motion, the court found "...there was neither evidence as to why Edelstein neglected to comply with discovery nor a showing that defendants diligently watched over the law suit." Ben Sager Chemicals International, Inc. v E. Targosz & Co., 560 F.2d 805, 811 (C.A.7, 1977). The court further noted that "...affidavits submitted by defendant did not show that defendant diligently kept track of the law suit" and that "...defendant's affidavits do not indicate that defendant made frequent inquiry as to the status of the case." id., page 811. In Dominguez v United States, 583 F.2d 615, 618 (C.A.2, 1978) affirmance of denial of Rule 60(b) relief was based upon the "inexcusable conduct" of counsel and that there was "...no indication of diligent efforts by appellant to induce him to fulfill his duty...". In Baez v S.S. Kresge Company, 518 F.2d 349, 350 (C.A.5, 1975), cert. denied 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976), the court stated that since the defendant's "...neglect was at least a partial cause, it must convince the Court that neglect was excusable before it can prevail".

II

THE REQUISITE ABUSE OF DISCRETION NECESSARY FOR REVERSAL IS NOT PRESENT IN THE CASE AT BAR

Under both motions the defendants had the burden of establishing the grounds for relief to the satisfaction of the district court. Both decisions demonstrated a thoughtful analysis of the facts and legal

principles involved. See generally Phillips v Insurance Company of North America, op. cit., page 1167; Wilson v Moore and Associates, Inc., op. cit., page 370; Federal Trade Commission v Packers Brand Meats, Inc., 562 F.2d 9, 10 (C.A.8, 1962).

The review of a trial court's discretionary act is narrow. The question is not what action would the reviewing court take, but did the district court abuse its discretion. "...(I)t is not enough that a grant of (defendant's motion) might have been permissable or warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion." Fackelman v Bell, 564 F.2d 734, 736 (C.A.5, 1977). See also Phillips v Insurance Company of North America, op. cit., page 1167, 1168; Virgin Islands National Bank v Tyson, 506 F.2d 802, 804 (C.A.3, 1974), cert. denied 421 U.S. 906, 95 S.Ct. 1976, 44 L.Ed.2d 467, (1975).

And there must be a "...clear showing of abuse of discretion...". Daily Miror, Inc. v New York News, Inc., 533 F.2d 53, 56 (C.A.2, 1976), cert. denied 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 140 (1976); Consolidated Masonry & Fireproofing, Inc. v Wagman Construction Corporation, op. cit., page 251. See also Sears, Roebuck & Co. v American Mutual Liability Insurance Co., 372 F.2d 435, 438 (C.A.7, 1967).

As set forth in Delno v Market St. Ry. Co., 124 F.2d 965, 967 (C.A.9, 1942) "...discretion is abused only where no reasonable men would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said

that the trial court abused its discretion." See also Beshear v Weinzapfel, 474 F.2d 137, 134 (C.A.7, 1973).

The question is not whether the reviewing court would reach a different decision, but rather, did the district court abuse its discretion. National Hockey League v Metropolitan Hockey Club, Inc., 1976, 427 U.S. 639, 642, 97 S.Ct 2778, 2780, 49 L.Ed.2d 747; See also Baez v S.S. Kresge Company, op. cit., page 350.

CONCLUSION

Given the dilatory course of conduct of the defendants and of their attorney and the failure to allege facts to explain that course of conduct or to provide an excuse other then negligence and law office failure for the default in answering, the granting of the Rule 55(b) motion and the denial of the Rule 60(b)(1) motion were within the proper discretion of the court. The appeal should, in all respects, be denied.

Respectfully submitted,

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COUNTY OF NEW YORK } ss.

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_____, BEING DULY SWORN, DEPOSES AND SAYS THAT DEPONENT IS NOT A PARTY TO THE ACTION, IS OVER 18 YEARS OF AGE, AND RESIDES AT THE ADDRESS SHOWN ABOVE, OR AT _____.

THAT ON THE 21 DAY OF APRIL, 1981, DEPONENT PERSONALLY SERVED THE WITHIN BRIEF OF PLAINTIFFS-APPELLEES

UPON THE ATTORNEYS, AND BY THE METHOD DESIGNATED BELOW, WHO REPRESENT THE INDICATED PARTIES IN THIS ACTION, AND AT THE ADDRESSES BELOW STATED, WHICH ARE THOSE THAT HAVE BEEN DESIGNATED BY SAID ATTORNEYS FOR THAT PURPOSE.

☒ BY LEAVING 2 TRUE COPIES OF SAME WITH A DULY AUTHORIZED PERSON AT THEIR DESIGNATED OFFICE.

☐ BY DEPOSITING ____ TRUE COPIES OF SAME ENCLOSED IN A POSTPAID PROPERLY ADDRESSED WRAPPER, IN THE POST OFFICE OR OFFICIAL DEPOSITORY UNDER THE EXCLUSIVE CARE AND CUSTODY OF THE UNITED STATES POST OFFICE DEPARTMENT WITHIN THE STATE OF NEW YORK.

NAMES OF ATTORNEYS SERVED, TOGETHER WITH THE NAMES OF THE CLIENTS REPRESENTED AND THE ATTORNEYS' DESIGNATED ADDRESSES.

VOGEL & ROSENBERG
ATTORNEYS FOR DEFENDANTS-APPELLANTS
41 EAST 42ND ST.
NEW YORK, N.Y. 10017

Nelson Caban

SWORN TO BEFORE ME THIS
21 DAY OF April, 1981.
Micheal DeSantis

MICHEAL DeSANTIS
Notary Public, State of New York
No. 41-0936908
Qualified in Queens County
Commission Expires March 30, 1983

ORIGINAL